No. 204

In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM B. F. HALL, AILEEN HALL SHOAFF, ARTHUR F. HALL, JR., ALVA J. MCANDLESS, FRED B. SHOAFF, II, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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OPINIONS BELOW

The opinion of the District Court (R. 2-9) is not officially reported. The opinion of the Court of Appeals (Pet. 1a-4a) is reported at 242 F. 2d 412.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on March 25, 1957. (Pet. 6a.) The petition for certiorari was filed on June 19, 1957. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the District Court and Court of Appeals correctly held that insurance renewal commissions, to which the decedent was otherwise entitled by reason of his employment contract with the Lincoln National Life Insurance Company, which were assigned by him to his wife, and which were later paid to her, are includable in the decedent's gross income under Section 22(a) of the Internal Revenue Code of 1939.

2. Whether the District Court and Court of Appeals correctly held that $2,400 excluded by the decedent's executors in preparing his income tax return for the taxable period preceding his death on November 9, 1942, was not received under a sickness and health plan of his employer and accordingly was not excludable from gross income under Section 22(b)(5) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Internal Revenue Code of 1939:

Sec. 22. Gross Income.

(a) [as amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or

use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * *

(b) *Exclusions from Gross Income.*—* * *

* * * * * *

(5) [as amended by Secs. 113 and 127(d), Revenue Act of 1942, c. 619, 56 Stat. 798]—*Compensation for injuries or sickness.*—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 23(x) in any prior taxable year, amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, and amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country;

* * * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

STATEMENT

The relevant facts as stipulated (R. 10-17) and as found by the District Court (R. 2-9) may be summarized as follows:

On July 1, 1905, Arthur F. Hall, the decedent, entered into an employment contract with the Lincoln National Life Insurance Company. (R. 13.) This contract provided for a stated salary of $2,600 per year and commissions based upon a percentage of renewal premiums on life insurance policies written by Lincoln during the period ending fifteen years from the effective date of the contract. (R. 13, 18-21.)

In 1923, Hall became president of the company and held that office until February, 1939. At that time, he became chairman of the board of directors of the company and held that office until his death on November 9, 1942. (R. 13.)

On March 31, 1932, Hall executed an instrument purporting to be a gift assignment of the 1905 employment contract to his wife, Ann O'Rourke Hall, and contingently to William B. F. Hall, Aileen Hall Shoaff, and Arthur Fletcher Hall, Jr. (R. 13, 24-25.)

During the year 1941 and the period January 1, 1942, to November 9, 1942, Mrs. Hall received pursuant to the assignment commissions of $4,749.33 and $3,799.99 respectively. (R. 12.) The District Court held that these commissions received by Mrs. Hall were includible in the decedent's gross income under the decision of this Court in *Helvering* v. *Eubank*, 311 U.S. 122, which it considered to be identical in all material respects with the instant case. (R. 4.) The Court of Appeals affirmed. (Pet. 1a-4a.)

In February, 1942, Hall became ill while vacationing in Florida. He had suffered for a long time with arteriosclerosis and his illness in February, 1942, resulted from a condition associated with that disease. He did not return to his office after May 11, 1942. (R.

7, 13.) He was not replaced as the chief executive officer of the company and continued to act as its directing head from May 1942, until shortly before his death. His secretary worked at his home practically every day and many of the executives and officers of the company conferred with him frequently; during this period he was actively engaged in establishing company policy. The immediate cause of his death was uremia. (R. 7-8.)

During the year 1942, the Lincoln National Life Insurance Company had in effect a plan for its employees providing for benefits based upon years of service and salaries in the event of sickness of an employee. (R. 15, 26-29.) The plan was administered by the personnel department of the company and notice of sickness was to be given that department. The payroll department of the company was not notified of the sickness of an employee unless there was a difference between the amount of benefits to which the employee was entitled and the salary which he had been drawing. The personnel department was to determine in each case whether an employee qualified for benefits under the plan. (R. 8.)

The decedent's executors, in preparing his income tax return for the period January 1, 1942, to November 9, 1942, the date of his death, excluded $2,400 from his gross income for that period. (R. 5.) Hall's annual salary was $50,000. (R. 6.)

The District Court found that Hall continued to carry on the duties of his office sufficiently to be entitled to his salary for the period prior to his death and that his illness did not necessitate the neglect of his official duties. It also found that there was no evidence that the procedures established by the company for re-

ceiving benefits under the plan were followed in Hall's case. The District Court further found that the $2,400 "was in fact received as salary rather than as compensation for sickness through health insurance [and that] it does not qualify as an exclusion and must be included in gross income." (R. 8, 9.) The Court of Appeals affirmed. (Pet. 4a.)

ARGUMENT

The legal and factual issues presented to the District Court and the Court of Appeals received careful consideration and were correctly decided. There is no conflict of decisions nor any other reason for further review by this Court.

1. This is another case presenting the question whether the incidence of taxation can be shifted from one person to another by means of an anticipatory assignment of income. In *Helvering* v. *Eubank*, 311 U.S. 122, this Court was presented with a case involving facts which were identical in all material respects to those present here. In *Eubank* a life insurance agent made assignments, in 1924 and 1928, of renewal commissions on insurance policies which were to become payable to him in the future. One of the assignments (the 1924 assignment) involved, as does this case, a transfer of the underlying employment contract which gave the taxpayer a right to receive commissions already earned. This Court, without distinguishing between the transfer of the commissions and the transfer of the underlying contract, held that the assignments were not effective to cause the commissions to be taxed as income to the assignee rather than to the assignor who had earned them. The District Court and the Court of Appeals in the instant case correctly rec-

ognized, we submit, that the *Eubank* decision was controlling here and that the commissions involved were income of the decedent taxable to him under Section 22(a) of the Internal Revenue Code of 1939, *supra*, pp. 2-3.

Although the petitioners admit that *Eubank* is identical with this case, they contend (Pet. 11) that for "divergent reasons" the parties argued the *Eubank* case as if it involved only an assignment of rights to future income and not as an assignment of the underlying property (the contract) itself. They urge that the well-settled rules concerning the tax consequences of an anticipatory assignment of income (*Lucas v. Earl*, 281 U.S. 111; *Helvering v. Horst*, 311 U.S. 112) are not applicable when "property" is assigned. But as the Court of Appeals pointed out (Pet. App. 4), this argument fails to distinguish between "a transfer of income derived from an obligation to pay compensation and a transfer of income-producing property." Here, although the employment contract might be characterized as "property" for some purposes, it embodied only the right to receive future income already earned by the decedent. And, although a *bona fide* transfer of income-producing property will result in the income produced by the property being taxed thereafter to the new owner (cf. *Blair v. Commissioner*, 300 U.S. 5), this is not so when the "property" which has been transferred consists merely of the right to receive income.[1]

[1] Certainly the interest coupons involved in *Helvering v. Horst*, *supra*, were "property" rights capable of being transferred, representing only the right to receive future income, yet it was held that their transfer was ineffective to shift the tax liability from the assignor to the assignee. The same argument put forward in this case by petitioners was made in *Horst* and was rejected. See 311 U.S. 112, 113.

(Cf. *Strauss* v. *Commissioner*, 168 F. 2d 441 (C.A. 2d), certiorari denied, 335 U.S. 878.) Moreover, the opinion of the Court of Appeals in *Eubank* (140 F. 2d 755 (C.A. 2d)), which was reversed by this Court, shows that it was predicated on the theory that there had been an assignment of property rights and not merely of income, the identical theory advanced by petitioners here. Indeed, the same argument was made to this Court in *Eubank* (Brief for Respondent, pp. 8-17, No. 205, O. T., 1940) and the same contentions were advanced in the dissenting opinion in this Court (311 U.S. 122, 125-127). There is thus no basis for the argument that *Eubank* did not present the same contentions urged by petitioners.[*]

2. The District Court and the Court of Appeals held that the $2,409 excluded from the decedent's tax return prepared by his executors for the period from January 1, 1942, to November 9, 1942, was not excludable from gross income as an amount received through health insurance since it was not received under the health insurance plan of the employer but rather was a part of decedent's compensation for services rendered to his employer during that period. As presented to the courts below, this issue is purely factual and the concurrent findings of both lower courts are entitled to finality in the absence of exceptional circumstances. (Cf. *Lyon-Shaw* v. *Group of Investors*, 335 U.S. 211, 213, 214.)

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[*] The following of *Hall* v. *Burnet*, 54 F. 2d 143 (C.A. D.C.), urged by petitioners (Pet. 13), was rejected by this Court in *Horst* and *Eubank*. Indeed petitioners concede (Pet. 15) that their reliance on *Hall* asserted conflict with *Hall* v. *Burnet* is pertinent only if their interpretation of the *Eubank* decision is correct.

The evidence in this case shows that, during the period from May, 1942, until shortly before his death, the decedent continued to perform all of his duties as directing head of the company, although he did not go to his office. He worked with his secretary almost every day during that period, conferred frequently with other company officials and continued to engage actively in establishing company policy. As the District Court stated (R. 87): "The determinate fact is that he was not so disabled as to be prevented from performing to a substantial extent the duties and functions of his office." In these circumstances we submit that the finding that Hall did not receive the $2,400 as a benefit under the company health insurance plan[1] is fully warranted by the evidence and presents no question calling for review by this Court.[2]

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[1] Other factors supporting the District Court's findings are that the decedent's doctor testified that he was able to make decisions and converse intelligently on company affairs (R. 76, 78); that there was no change in his influence in the company (R. 54); that only a small, arbitrarily selected amount was claimed as being received pursuant to the plan and that there was no compliance with any of the usual company procedures in determining whether he was entitled to benefits under the plan (R. 60).

[2] Petitioners argue (Pet. 15-18) that the decision of the Court of Appeals on this issue is incorrect in view of *Haynes* v. *United States*, 353 U. S. 81, which was not yet decided when the Court of Appeals filed its opinion in this case. This argument fails to recognize, however, that the Court of Appeals did not decide that the health plan of the Lincoln National Life Insurance Company was not "health insurance" within the meaning of Section 22(b)(5) of the Internal Revenue Code of 1939, *supra*, p. 3. Indeed that court had previously held that the identical plan was health insurance in *Lyncour* v. *United States*, 199 F. 2d 508. But here, the court found it unnecessary to reach that issue in view of its affirmance of the District Court's finding that the decedent did not receive the $2,400 as benefits under the plan. The Government had suggested to the Court of Appeals (Brief for the Appellee, p. 18,

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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JULY 1957.

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to do, that if it concluded that the District Court's finding was clearly erroneous, it withhold its decision until the resolution of the *Hawes* issue by this Court. There is no basis, therefore, for the assertion that this case is not in accord with *Hawes*.